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Supreme Court of the United States

OCTOBER TERM, 1943

No. 441

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE,

Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITIONER'S BRIEF.

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INDEX.

		Page
(1)	Citation below	1
(2)	Basis of Courts Jurisdiction	2
(3)	Statement of Facts	2
(4)	Assignments of Errors	5
(5)	Summary of Argument	6
(6)	Argument	6
	A. Nature of Tax	6
	B. Recent Decisions of Court have not decided question	8
	C. Tax Violates Due Process Clause	12
	D. Tax Violates Commerce Clause	14
	E. Conclusion	24
(7)	Appendix	26
	(a) Use Tax Act	26
	(b) Sales Tax Act	30

TABLE OF CASES.

	Page
Adams Manufacturing Co. vs. Storen, 304 U. S. 307	16, 20
Alpha Portland Cement Co. vs. Massachusetts, 268 U. S. 203	14
Armour and Co. vs. Virginia, 246 U. S. 1	19
Asher vs. Texas, 128 U. S. 129	16
Brennan vs. Titusville, 153 U. S. 289	16
Brown vs. Simpson, 314 U. S. 674	2
Browning vs. Waycross, 233 U. S. 16	16
Caldwell vs. North Carolina, 187 U. S. 622	16, 18
Case of State Freight Tax, 15 Wall, 232	16
Caskey Baking Co. vs. Virginia, 313 U. S. 117	18, 21

Cheney Brothers Co. vs. Massachusetts, 246 U. S. 147. 20
Connecticut General Life Insurance Co. vs. Johnson, 303 U. S. 77 13
Cooney vs. Mountain States Telephone and Telegraph Co., 294 U. S. 384..... 16
Corson vs. Maryland, 120 U. S. 502..... 16
Crenshaw vs. Arkansas, 227 U. S. 389..... 16
Crew Levick Co. vs. Pennsylvania, 245 U. S. 292....16, 20
Crutcher vs. Kentucky, 141 U. S. 47..... 16
Curry vs. McCanless, 307 U. S. 357..... 23
Davis vs. Virginia, 236 U. S. 697.....16, 18
D. L. & W. Ry. Co. vs. U. S., 231 U. S. 363..... 14
Dozier vs. Alabama, 218 U. S. 124 .....16, 18
Educational Films Corp. vs. Ward, 282 U. S. 379.... 7
Emert vs. Missouri, 156 U. S. 296..... 21
Felt & Tarrant Mfg. Co. vs. Gallagher, 306 U. S. 62..8, 10
Felt & Tarrant Mfg. Co. vs. Corbett, 23 Fed. Supp. 186. 9
Fisher's Blend Station vs. State Tax Commission, 297 U. S. 650 20
Frick vs. Pennsylvania, 268 U. S. 473..... 13
Gibbons vs. Ogden, 9 Wheat 1..... 14
Green vs. C. B. & Q. Ry. Co., 205 U. S. 530..... 13
Gwin, White & Prince, Inc., vs. Henneford, 305 U. S. 434 23
Hans Rees' Sons vs. North Carolina, 283 U. S. 123... 13
Henneford vs. Silas Mason Co., 300 U. S. 577..... 6, 8
Heyman vs. Hays, 236 U. S. 178..... 15
International Text Book Co. vs. Pigg, 217 U. S. 91... 14
James vs. Dravo Contracting Co., 302 U. S. 139..... 13
Leloup vs. Port of Mobile, 127 U. S. 640..... 16
Lyng vs. Michigan, 135 U. S. 161..... 20
Macallen vs. Massachusetts, 279 U. S. 620..... 7

McCall vs. California, 136 U. S. 104 16
Machine Co. vs. Gage, 100 U. S. 676 20
McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33 ..... 15, 17, 19, 22
McLeod vs. J. E. Dillworth Company, 171 S. W. (2d) 62 2
Monamotor Oil Co. vs. Johnson, 292 U. S. 86 ..... 8, 10
Murdock vs. Pennsylvania, 319 U. S. 105 ..... 15, 17, 20
Nelson vs. Montgomery Ward & Co., 312 U. S. 373 ..... 3, 8, 9, 11, 12, 15
Nelson vs. Sears, Roebuck & Co., 312 U. S. 259 ..... 3, 7, 8, 9, 11, 12, 15
Ozark Pipe Line vs. Monier, 266 U. S. 555 15
People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79 13
Philadelphia & Reading Railway Co. vs. McKibbin, 243 U. S. 264 13
Puget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90 20
Real Silk Hosiery Mills vs. Portland, 268 U. S. 325 ... 16
Rearick vs. Pennsylvania, 203 U. S. 507 16
Rhode Island Hospital Trust Co. vs. Doughton, 270 U. S. 69 13
Robbins vs. Shelby County Taxing District, 120 U. S. 489 ..... 15, 16, 17, 18, 19, 21, 24
Rogers vs. Arkansas, 227 U. S. 401 16
Simpson vs. Gundry, 297 Mich. 403, 298 N. W. 81 2
Sonneborn Bros. vs. Cureton, 262 U. S. 506 23
State Tax Commission vs. General Trading Co., Ia., 10 N. W. (2) 659 1
State Tax Commission vs. Aldrich, 316 U. S. 174. 10, 11, 23
Stewart vs. Michigan, 232 U. S. 665 16

Stockard vs. Morgan, 185 U. S. 27..... 16
Stoutenburgh vs. Hennick, 129 U. S. 141..... 16
Surplus Trading Co. vs. Cook, 281 U. S. 647..... 13
Texas Transport & Terminal Co. vs. New Orleans, 264 U. S. 150 16
United States vs. Andrews & Co., 207 U. S. 229..... 14
Wagner vs. City of Covington, 251 U. S. 95.....20, 21
Walling vs. Michigan, 116 U. S. 446..... 21
Welton vs. Missouri, 91 U. S. 275..... 21
Western Live Stock vs. Bureau of Revenue, 303 U. S. 250 23
Western Oil Refining Co. vs. Lipscomb, 244 U. S. 346. 16
Wisconsin vs. J. C. Penny Co., 311 U. S. 435..... 7, 10

TABLE OF STATUTES.

Page
Secs. 6943.102-6943.125, Iowa Code of 1939 (Iowa Use Tax Law 26-30
Secs. 6943.102(6), Iowa Code of 1939 (Iowa Use Tax Law) 2, 27
Code 6943.103 .....7, 24, 27
Code 6943.104 ..... 4, 27
Code 6943.122 2
Code 6943.109 ..... 4, 28
Code 6943.075, Iowa Code of 1939 (Sales Tax Law) 4, 30
Sec. 237, Judicial Code (18 U. S. Code, 344b)..... 2
14th Amendment to Constitution (due process clause) 5, 12
Art. 1, Sec. 8, Clause 3 (commerce clause)..... 5, 14

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vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITIONER'S BRIEF.

I.

The decision of the Supreme Court of Iowa is reported in *State Tax Commission of Iowa vs. General Trading Company*, ... Iowa, ..., 10 N. W. (2) 659 (July 27, 1943). It has not appeared in the official Iowa reports.

II.

The jurisdiction of this court is invoked under the order of this court dated November 22, 1943, granting certiorari, (R. 27) under Section 237(b), as amended, of the Judicial Code. Presumably the writ was granted because the decision below was in conflict with a decision of the Supreme Court of Michigan in *Simpson vs. Gundry*, 297 Mich. 403, 298 N. W. 81, certiorari denied *sub. nom. Brown vs. Simpson*, 314 U. S. 674, and with a decision of the Supreme Court of Arkansas in *McLeod vs. J. E. Dillworth Co.*, 171 S. W. (2nd) 62 (not yet officially reported), certiorari granted October 25, 1943, No. 311.

III.

STATEMENT OF FACTS.

The question presented is the validity of the use tax law of Iowa as applied to the particular sales here. The Iowa use tax law imposes a tax on the use of personal property purchased for the use in Iowa, and provides that such tax shall be collected when sold by a "retailer maintaining a place of business in this State," and makes *the retailer personally liable therefor.* (Sec. 11, 6943.122.)

The Supreme Court of Iowa held that the law in terms applied to petitioner because it was a "retailer maintaining a place of business in this State" within the statutory definition contained in the use tax law because it sent traveling salesmen into the state who were there only "temporarily".[1] That question is, of course, not open here, since

[1]For this statutory definition see paragraph 6, Section 1, of the Law (6943.102 Code).

that is purely a State question but that construction we assert renders the act unconstitutional.

This is the same tax law that was involved in *Nelson vs. Sears, Roebuck & Company*, 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company*, 312 U. S. 373. The law itself is to be found in Sections 6943.102-6943.125 of the Iowa Code of 1939. It is reproduced in the appendix to this brief.

In the Sears, Roebuck Case supra (361), this Court summarized the terms of this law as follows:

> "The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, sec. 6943.074, et seq. It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price. 'Use,' so far as material here, is defined as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.' Sec. 6943.102. While the tax is imposed on 'every person using such property within this state until such tax has been paid' (sec. 6943.103), it is further provided (sec. 6943.109) that every 'retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser . . .' By sec. 6943.112 the tax constitutes a 'debt owed by the retailer' to the state. And if the retailer fails to collect the tax, etc., his retailer's permit (sec. 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. Sec. 6943.122"

It is only necessary to add that this use tax law applies only to *sales made without the state*. While the law in terms applies to all sales "whether within or without the

state," (sec. 8, 6943.109) yet sales *within* the state are subject to the sales tax (Code 6943.075, Sec. 2) and all sales subject to the sales tax are excluded from the operation of the use tax. (Code 6943.104, Sec. 3 (1)).

Petitioner is a Minnesota corporation, with principal place of business at Minneapolis, Minnesota. It is not admitted to do business in Iowa, and it has no office, agent, or place of business and does no business in that State.[2]

Its business is largely dealing in wholesale iron and steel and automobile accessories, which it sells, among others, to retailers in Iowa. Such sales and the properties covered are concededly not within the Iowa use tax. It occasionally sold its products to persons living in Iowa who were not retailers, but bought them for their own use, and the Iowa Supreme Court held petitioner liable for the use tax upon the products so sold. No question is raised as to the amount of the tax, if petitioner is liable for any of it.

Petitioner sent its traveling solicitors or drummers into Iowa. None of them either lived in Iowa or had quarters there. There they obtained the tentative orders which they were without authority to accept, and did not accept. These orders were transmitted to the head office in Minneapolis, Minnesota, and if the customer's credit was acceptable, the order was accepted at Minneapolis, and the goods shipped either by railway, bus, or parcel post, at the expense of the customer (R. 5-6).

The Iowa Tax Commission assessed petitioner for this use tax, which it refused to pay. Suit was brought to collect

[2]The Supreme Court of Iowa, held that petitioner was not doing business in Iowa, in the ordinary sense, apart from the statutory definition. (R. 20).

The Court said:

> "The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer, but we are dealing with a statutory definition."

the tax (R. 1-5). For the purpose of determining an important Federal question petitioner appeared voluntarily and set up in detail exactly how these sales were made (R. 5-8).

The Tax Commission demurred to petitioner's answer (R. 8), and the District Court sustained the demurrer (R. 9-12). Petitioner refused to plead further and judgment was entered against it (R. 12). Petitioner appealed to the Supreme Court of Iowa (R. 13), where the judgment was affirmed (R. 17-26).

In its answer, to which the demurrer was sustained, petitioner specifically set up and claimed that the imposition of this tax violated both the due process clause of the Fourteenth Amendment and the commerce clause (R. 6-7).

These contentions were renewed in the Iowa Supreme Court (R. 14-16), where they were rejected (R. 17-26). This court granted certiorari (R. 27).

IV.

ASSIGNMENTS OF ERROR.

The Court below, the Supreme Court of Iowa, erred:

(1) In holding that the use tax law of Iowa, as applied to the facts here, did not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

(2) In holding that the use tax law of the State of Iowa, as applied to the facts here, did not violate the commerce clause of the United States Constitution, to-wit: Article I, Section 8, Clause 3.

V.

SUMMARY OF ARGUMENT.

While the law designates this tax as a use tax, yet since the only thing which petitioner did was to sell the property and not use it, so far as petitioner is concerned it was in effect a sales tax. Since it applies only to sales made outside the state, and all such sales were in fact made outside of Iowa and petitioner was not doing business in Iowa, this use tax law as applied to petitioner and the imposition of a tax thereunder violates the due process clause of the Fourteenth Amendment. Since the only thing petitioner did in Iowa was to send solicitors into the state, which is a part of interstate commerce, such law as applied to petitioner violates the commerce clause.

VI.

ARGUMENT.

(All Italics Supplied)

A. Nature of the Tax.

The argument of the state seems to be this: That the tax here involved is a use tax levied on the use of property within the state of Iowa, and that the imposition of that tax is not prohibited by the due process clause because the "taxable event", i. e., the use, occurs within the jurisdiction of Iowa and, since the interstate transportation is over before the use can begin, the levy of such a tax does not violate the commerce clause (*Henneford vs. Silas Mason Co.*, 300 U. S. 577).

This argument is unanswerable as to anyone who actually uses the property within the territorial jurisdiction of Iowa.

But here the law requires that this petitioner, who is not in Iowa and who only makes sales outside of Iowa, pay a tax on the use that someone else makes of the article within the state.

True, petitioner is supposed to reimburse itself by collecting the amount of the tax from its customers, but petitioner is liable for the tax whether collected or not. The judgment in this case compells petitioner to pay it. It is not apparent how an invalid tax can be converted into a valid one merely because the seller can avoid an actual out-of-pocket loss.

The law imposes a tax on "the purchase price of such property" (6943.103). True, it is designated a use tax but, petitioner did not use the property and, if it had been designated a sales tax, the effect on petitioner would have been the same. All that petitioner did was to sell the property outside the state of Iowa for use in Iowa, and it is taxed because it did so. Therefore, it is just as much a sales tax so far as petitioner is concerned as though it were expressly designated such.

It is not important what label the state legislature or the state court puts upon a tax. It is its natural and reasonable effect which governs. This is Hornbook law. But see—

Macallen vs. Mass., 279 U. S. 620 (625) and cases cited.

Wisconsin vs. J. C. Penney Co., 311 U. S. 435 (443) and cases cited.

Educational Films Co. vs. Ward, 282 U. S. 379.

Nelson vs. Sears, Roebuck & Co., supra (363).

B. None of the Recent Decisions of this Court Can Be Construed as Sustaining this Use Tax Law.

The Supreme Court of Iowa deemed that this case was controlled by *Nelson vs. Sears, Roebuck & Company*, 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company*, 312 U. S. 373.

Nobody now disputes the right of the State to tax the user within the State on the use of property even though that property comes from another State. *Henneford vs. Silas Mason Company*, supra.

The right of a State to require a foreign corporation, *actually doing business within such State* (whether formally licensed to do business or not), to act as a collecting agent of the State for the purposes of the use tax is no longer open to question since the *Sears, Roebuck case*. This seems to be true whether or not the particular sales are brought about by the business done within the State. *Monamotor Oil Company vs. Johnson*, 292 U. S. 86; *Nelson vs. Sears, Roebuck & Company*, supra; *Nelson vs. Montgomery Ward & Company*, supra. *Felt & Tarrant Mfg. Co. vs. Gallagher*, 306 U. S. 62. In all these cases the corporation was *actually doing business in the state*.

In the *Felt & Tarrant Manufacturing Company* case (supra), upon which the state laid such emphasis in its brief opposing certiorari, that corporation was doing business in the state although not licensed so to do. It had to be doing business for the law to apply. While the California law applied to a "retailer maintaining a place of business in the state" as does the Iowa law, there was no definition of the term in the law, which would include mere soliciting. On the contrary rule six of the Board, defined

"Place of business" as "*an office or other premises regularly used by the retailer for the transaction of business.*" See *Felt & Tarrant Manufacturing Co. vs. Corbett*, 23 Fed. Supp. 186 (191), (the decision below), where the three judge Court held:

> "The allegations of the bill . . . . fully warrant the conclusion that plaintiff's method of doing business includes maintaining *at least two places of business in California.*"

See the discussion of the case by Mr. Justice Roberts in his dissenting opinion in the *Sears, Roebuck* case supra (370).

But here we have a situation where (1) solicitors were sent into Iowa who solicited an order for the sales, but did not make them; (2) the orders were accepted and sales were actually made outside the State and the property delivered to the purchaser outside the State by delivery to a common carrier; (3) petitioner was not doing business in Iowa, and was not licensed so to do.

It is clear that the Iowa Supreme Court misinterpreted the *Sears, Roebuck* and *Montgomery Ward* cases. The real reason for these decisions was this:

The defendants were foreign corporations admitted to do business in the State of Iowa, and maintained in Iowa retail stores. As a price to be paid for the privilege of doing business in Iowa, the burden of collecting the use tax could be imposed. Note the language of the Court in the *Sears, Roebuck* case as follows:

> "Since Iowa has extended to it that privilege (doing business in the state), Iowa can exact this burden (i. e., compel it to act as the collecting agent of the state) as a price of enjoying the full benefits flowing from its Iowa business." (364)

The same rule applies where the corporation is *actually doing business* without being formally licensed. *Monamotor Oil Company vs. Johnson*, supra. *Felt and Tarrant Mfg. Co. vs. Gallagher*, supra. But where, as here, a corporation is neither licensed to do business in a State nor, in fact, doing any business therein except the solicitation of orders in interstate commerce, the State cannot levy such a tax due to "impotence of state power." It may be claimed as the Iowa Supreme Court intimated (R. 22), that this Court used the term "impotence" as meaning impotence of State power to collect the tax, and not impotence to levy the tax, but a further reading of the opinion clearly discloses that this Court did not use the words "impotence of state power" in that sense. This Court said:

> "It points to the fact that in its mail order business it is in competition with out-of-state mail order houses *which need not and do not collect the tax on their Iowa sales.* But those other concerns *are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price*" (365).

The cases of *Wisconsin vs. J. C. Penny Company*, 311 U. S. 435, and *State Tax Commission of Utah vs. Aldrich*, 316 U. S. 174, while differing somewhat on the facts, were decided on this same theory.

In the *J. C. Penny Case* this court said:

> "The simple but controlling question is whether the state has given anything for which it can ask return. *The substantial privilege of carrying on business in Wisconsin*, which has here been given, *clearly supports the tax*, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders." (443)

In the *Utah Tax Commission* case, the court said:

> "Suffice it to say that if that freedom of transfer exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. *It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return.*" (180)

As we read the *Sears, Roebuck* and the *Montgomery Ward* decisions, this Court in no way disapproved of the propositions of law laid down in Mr. Justice Roberts' dissenting opinion. This Court merely held those propositions were inapplicable to the case for the sole reason that there the foreign corporations had been licensed to transact business in Iowa, and were in fact transacting business, and, hence, were liable for the tax.

If this is not what the *Sears, Roebuck* and *Montgomery Ward* decisions mean, then they must mean that anyone in the United States from Maine to California (even though he has never been in, or had any representative within the State of Iowa), who sends by mail or otherwise into Iowa any tangible property which the purchaser intends to use therein, must collect and pay to the State of Iowa a use tax thereon, or at least that a valid law could be enacted that would require this.

We do not believe that this Court intended to commit itself to any such doctrine because it would appear axiomatic that in order that petitioner be subject to a tax in Iowa there must have occurred in that State some "taxable event" on the part of petitioner. The only things done by petitioner that could possibly be claimed to in any way connect it with Iowa are the following:

a. That after having made a contract for the sale of the property in Minnesota, it performed that contract there, by delivery in Minnesota to common carriers, which in turn transported the property to destination in Iowa.

b. Prior to the making of the contracts of sale in Minnesota it had sent into Iowa traveling salesmen who did not live in such State and had no quarters there and who merely passed into the State and out again. These traveling salesmen took tentative orders which they were without authority to and did not accept.

We hope to demonstrate that neither of these activities constituted a "taxable event" in Iowa.

The difference between the situation in the *Sears, Roebuck* and *Montgomery Ward* cases and the situation here is that there the State had extended a privilege and therefore had the right to impose conditions; here the State had extended no privilege because the right to solicit interstate business was a privilege conferred by the Federal Constitution.

C. This Tax Violates the Due Process Clause of the Fourteenth Amendment Since the Sale of the Property Was Not a "Taxable Event" in Iowa.

While the Iowa use tax law in terms applies to all sales "whether within or without the state," yet the words "within . . . . the state" are effectively eliminated because if the sales are made within the state they are subject to the sales tax and not the use tax. Unless a foreign corporation is licensed to do business in a state (or is actually doing business there without a license), a state cannot tax any of its transactions or property beyond the state. Such a tax violates the due process clause.

Frick vs. Pennsylvania, 268 U. S. 473.
Surplus Trading Co. vs. Cook, 281 U. S. 647.
James vs. Dravo Contracting Co., 302 U. S. 139.
Hans Rees Sons vs. North Carolina, 283 U. S. 123.
Connecticut General Life Insurance Company vs. Johnson, 303 U. S. 77.
Rhode Island Hospital Trust Company vs. Doughton, 270 U. S. 69.

The converse apparently deducible from the *Sears, Roebuck, Montgomery Ward* and *J. C. Penny Co.* cases is that where a foreign corporation is *licensed by the State to transact business therein or is actually transacting business*, the State may, as a condition to permitting it to so transact business, even require the corporation to pay taxes on transactions beyond the State's jurisdiction. This rule undoubtedly has its limitations, which it is not necessary to determine here:

The fact that petitioner sent solicitors into the State without authority to consummate contracts, but merely to solicit tentative orders does not constitute doing business within the State.

Green vs. C. B. & Q. Ry. Co., 205 U. S. 530.
People's Tobacco Company vs. American Tobacco Company, 246 U. S. 79 (87).
Philadelphia & Reading Railway Company vs. McKibbin, 243 U. S. 264 (268).

Unless the sales here were actually made outside of Iowa, the use tax by its terms does not apply. But, aside from this, there is no question but that these sales were consum-

mated in Minnesota, where the orders were accepted and where delivery was made to a common carrier.

United States vs. Andrews & Co., 207 U. S. 229.

D. L. & W. Ry. Co. vs. United States, 231 U. S. 363 (371).

Certainly this does not constitute a "taxable event" in Iowa and, since petitioner was not transacting business in Iowa, this tax violates the due process clause.

D. The Tax Violates the Commerce Clause, Since Sending Solicitors Into Iowa Is Not a "Taxable Event" in Iowa.

The validity of this tax cannot rest upon the fact that these articles were transported by a common carrier into Iowa.

Aside from the fact that all of petitioner's activities were outside of Iowa, and that it did not transport these articles at all, the transportation of these goods in interstate commerce by any one, was the enjoyment of an activity granted by the Federal Constitution and in no way dependent upon Iowa law.

> To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.
>
> *International Text Book vs. Pigg*, 217 U. S. 91 (109).

Gibbons vs. Ogden, 9 Wheat 1; *Alpha Portland Cement Co. vs. Massachusetts*, 268 U. S. 203. It, hence, cannot be the basis of a tax by Iowa.

> "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock vs. Pennsylvania*, 319 U. S. 105 (113).

See also *Ozark Pipe Line vs. Monier*, 266 U. S. 555; *Heyman vs. Hayes*, 236 U. S. 178.

The case is far different from *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U. S. 33, where the Coal Company was doing business in the State and *made the deliveries in New York itself*, and that delivery was what was taxed.

After all is said and done, if the Iowa law is to be sustained in this case it must be on the theory that solicitors of petitioner entered the State of Iowa and solicited these sales before any sale was in fact made.

In other words, this Court must, as the Iowa Court did, extend the doctrine of the *Sears, Roebuck* and *Montgomery Ward cases*, which are applicable only to a corporation actually doing business in the State, to a foreign corporation which does no business therein and only sends solicitors into the State for the solicitation of interstate orders. It is submitted on both reason and authority that this should not be done and that as construed by the highest court of Iowa, the act violates the commerce clause.

Solicitation of the sale of goods for an interstate commerce sale is a part of interstate commerce. Such solicitation of goods for an interstate commerce sale cannot be taxed by the State under any guise whatsoever. *Robbins vs. Shelby County Taxing District*, 120 U. S. 489. There this Court denounced a license or privilege tax on traveling salesmen or drummers who solicited sales in interstate commerce and who did not have a regular licensed house of

business within the taxing district. The rule laid down in the *Robbins* case has been reiterated not less than twenty times. *Corson vs. Maryland*, 120 U. S. 502; *Asher vs. Texas*, 128 U. S. 129; *Leloup vs. Port of Mobile*, 127 U. S. 640; *Stouttenburgh vs. Hennick*, 129 U. S. 141; *McCall vs. California*, 136 U. S. 194; *Crutcher vs. Kentucky*, 141 U. S. 47; *Brennan vs. Titusville*, 153 U. S. 289; *Stockard vs. Morgan*, 185 U. S. 27; *Caldwell vs. North Carolina*, 187 U. S. 622; *Crenshaw vs. Arkansas*, 227 U. S. 389; *Rogers vs. Arkansas*, 227 U. S. 401; *Rearick vs. Pennsylvania*, 203 U. S. 507; *Dozier vs. Alabama*, 218 U. S. 124; *Stewart vs. Michigan*, 232 U. S. 665; *Davis vs. Virginia*, 236 U. S. 697; *Browning vs. Waycross*, 233 U. S. 16; *Real Silk Hosiery Mills vs. Portland*, 268 U. S. 325; *Texas Transport & Terminal Co. vs. New Orleans*, 264 U. S. 150; *Crew Levick Co. vs. Pennsylvania*, 245 U. S. 292; *Western Oil Refining Co. vs. Lipscomb*, 244 U. S. 346.

This Court went farther and held in the *Robbins* case:

> "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." (497)

Nor was this rule that interstate commerce cannot be taxed at all, notwithstanding that the same amount of tax was laid on intrastate commerce ever questioned in any of these cases. This rule was first laid down in *Case of State Freight Tax*, 15 Wall. 232 (277); was reiterated in the *Robbins* case, supra; in *Crew Levick Company vs. Pennsylvania*, supra (297); was recognized in *Cooney vs. Mountain States Telephone & Telegraph Company*, 294 U. S. 384, and was expressly again reiterated in *Adams Manufacturing Company vs. Storen*, 304 U. S. 307 (312), where this Court said:

> "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

The rule was adverted to in the *Berwin-White Coal Mining Company* case, supra (57), and in *Murdock vs. Pennsylvania*, 319 U. S. 105 (113), where this Court said:

> "Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58), although it may tax the property used in, or the income derived from that commerce, so long as those taxes are not discriminatory." Id., p. 47 and cases cited.

There has been only one discordant note, i. e., certain *obiter dicta* in the *Berwind-White Coal Mining Company* case, supra, to-wit:

(a) The suggestion of the Court on page 56 where it is stated that the statutes in the *Robbins* case and the cases following it were

> "capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state."

An examination of these cases above cited shows that with the exception of the cases specifically to be mentioned, all of the statutes or ordinances involved, applied equally to intrastate as well as interstate commerce and this court held them invalid as to interstate transactions. As to whether these statutes discriminated in favor of retail stores cannot be determined from the statement of facts in the opinions

since this court was not interested in that phase. It is quite likely that in each case retail stores were subject to another form of taxation and that the imposition of the tax on solicitors was merely to equalize the burden of taxation rather than to discriminate. (Compare *Caskey Baking Inc. vs. Virginia*, 313 U. S. 117 (120). But even though it is possible to find any discrimination in favor of retail stores, that discrimination would be against both interstate and intrastate solicitors, and hence the statute could be invalidated only under the equal protection clause, and in no sense could be held a discrimination against interstate commerce.

In *Davis vs. Virginia*, supra, the opinion does not make clear whether the law applied to both interstate and intrastate commerce but presumably it applied to both.

In the *Robbins* case supra the law applied to drummers who did not have a licensed house of business within the taxing district. But by its terms the law applied to all Tennessee drummers (intrastate commerce) as well as those from outside of Tennessee (interstate commerce) and hence there was no discrimination against commerce among the states. Any discrimination in favor of retail stores was therefore a discrimination against all solicitors and not merely those in interstate commerce. The court having disposed of the case on another ground then pointed out (498) that "it would not be difficult" to show discrimination which, if it existed, merely emphasized a violation of the commerce clause. The same is true of *Caldwell vs. North Carolina*, supra (632).

In the *Dozier* case, supra, the law applied to all solicitors "not having an established place of business within the state." It applied as well to Alabama drummers as to for-

eign drummers provided they had no established place of business. Again if there was a discrimination in favor of retail stores it was a discrimination against all drummers and not those engaged in interstate commerce.

But the *Robbins* and every one of the cases following it was decided on the theory that interstate commerce could not be taxed at all and not on the theory of discrimination.

Any advantage in favor of retail stores was therefore, in the category mentioned in *Armour and Co. vs. Virginia*, 246 U. S. 1 (7) where the court said:

> "It follows therefore that, if the asserted disadvantage be real and not imaginary, it would be one not direct *because not arising from the operation and effect of the statute*, but indirect as a mere consequence of the situation of the persons and property affected and of the non-discriminating exercise by the State of power which it had a right to exert without violating the Constitution. . . ."

(b) The suggestion on pages 56 and 57 of the *Berwind-White Coal Mining Company* case, supra, that the doctrine of the *Robbins* case, and the cases following it

> "has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders."

This, again, was strictly obiter, since the tax there was sustained on the theory that the coal was delivered within the State.

However, if the Court intended to emphasize the words "*fixed-sum license taxes*," we think the Court must have spoken inadvertently, since, in the same opinion, it said (57):

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause * * *."

In *Murdock vs. Pennsylvania*, supra, this Court said:

> "It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes."

The taxes denounced in *Cheney Brothers Company vs. Massachusetts*, 246 U. S. 147; *Crew Levick Company vs. Pennsylvania*, supra; *Adams Manufacturing Company vs. Storen*, supra; *Fisher's Blend Station vs. State Tax Commission*, 297 U. S. 650, and *Puget Sound Stevedoring Company vs. State Tax Commission*, 302 U. S. 90, were not "fixed-sum license taxes." On principle, what distinction can be made between a fixed-sum license tax and a tax based on the amount of sales. None is apparent. See *Lyng vs. Michigan*, 135 U. S. 161, where the Court said (166):

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In view of the cases which the Court cites (*Machine Company vs. Gage*, 100 U. S. 676, and *Wagner vs. Covington*, 251 U. S. 95), it seems clear that the words which the Court intended to emphasize were "*imposed on the business of soliciting orders.*" Those cases merely laid down the rule

that there was a distinction between imposing a tax on a peddler who sold goods which had already been imported into the State, and imposing a tax on the solicitation of orders for goods thereafter to be brought into the State. This, of course, had always been the law. To the cases enunciating the so-called "peddler rule" could be added *Emert vs. Missouri*, 156 U. S. 296, and *Caskey Baking Company vs. Virginia*, 313 U. S. 117 (119).

This distinction between the soliciting and peddling was recognized in the *Robbins* case, supra (497), quoted with approval in *Wagner vs. Covington*, supra (103):

> "The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized. In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, Mr. Justice Bradley, who spoke for the court, said (p. 497): 'When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown v. Houston*, 114 U. S. 622; *Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, *before they are brought into the State*, is a very different thing, and seems to us clearly a tax on interstate commerce.'"

As to peddlers who carry the articles with them, there must be a discrimination against interstate commerce to render the taxing law invalid (*Welton vs. Missouri*, 91 U. S. 275; *Walling vs. Michigan*, 116 U. S. 446), but any tax which rests

for its basis, upon the act of soliciting orders for interstate commerce is a burden on such commerce, whether discriminatory or not.

In the *Berwind-White Coal Mining Company* case, this Court adopted the theory of the peddler cases, because the coal had already completed its interstate trip, and it was the "delivery of goods within the State" which was taxed (58).

While, of course, under Section 26 of the Iowa law (6943.125), if a sales tax were levied in Minnesota on the sale of this property (Minnesota now has no sales tax), it would reduce the Iowa use tax *pro tanto;* yet if Iowa can levy a tax because solicitors enter the State, notwithstanding the commerce clause, imagine what could occur in case of a sale in Washington, shipped by common carrier to Iowa, passing through Idaho, Montana, North Dakota and Minnesota on the way. If Iowa is not restrained from taxing the use of this property as against the petitioner by the commerce clause, then neither is Idaho nor Montana nor North Dakota nor Minnesota restrained from levying a tax on the transportation, nor is Washington restrained from levying a tax on the seller for sending its salesmen into Iowa and there taking orders. All of this would break down the century old holding that interstate commerce can be regulated only by the National Government and permit the States to burden interstate commerce by unrestricted taxation. It illustrates the wisdom of this Court in its previous decisions in not permitting interstate commerce to be taxed at all.

The claim that this Court should meet the situation of multiple taxation by various states as and when it arises, if adopted, will mean that the validity and enforceability of

the Iowa law rests on whether some other State with power to tax chooses to exercise that power. This theory runs entirely counter to what this Court has held in numerous cases, including *Gwin, White & Prince, Inc., vs. Henneford*, 305 U. S. 434, and *Western Live Stock vs. Bureau of Revenue*, 303 U. S. 250 (256).

The theory that the validity of a State tax is to be determined by whether some other State has exercised its power of taxation has been definitely repudiated by this Court.

Curry vs. McCanless, 307 U. S. 357 (368).

State Tax Commission vs. Aldrich, 316 U. S. 174.

To hold that this tax can be sustained as to interstate commerce, because substantially the same tax (sales tax) is levied upon intrastate commerce, is to overrule a very long series of cases decided by this Court. Many of these have been cited. While it is recognized that there may be some difference between a taxing statute and one of regulation (*Sonneborn Bros. vs. Curton*, 262 U. S. 506), it might with equal propriety be claimed that a State may regulate interstate rates, because it likewise fixes intrastate rates at the same level.

This would be to invoke the "equal protection" clause, of the Fourteenth Amendment, as the standard by which regulation or taxation of interstate commerce is to be judged, rather than the commerce clause.

E. CONCLUSION.

Counsel became righteously indignant in the brief opposing certiorari about the injustice that would result to retail stores in Iowa unless this tax were sustained. This is hardly an argument which should appeal to an appellate court but, however that may be, such argument is conclusively answered by this court's opinion in *Robbins vs. Shelby County Taxing District,* supra, where this court said (499):

> "To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

This, however, is not very important, since under Sections 2 and 5 (3) (6943.103, 6943.114), the State can collect this tax from the user of the property. Hence, in no event does the purchaser pay any less by buying out of the state.

After all is said and done, taxation is, as this Court has repeatedly observed, a practical subject, to be approached from the angle of the realities rather than the niceties of legal theory. Examined in that light, this case is one where a citizen of one State is proposed to be taxed by another State to which he is an utter stranger. Petitioner does not reside, has no place of business, and does no business in Iowa, and has not sought the protection of the Iowa laws. If this tax is to be sustained, it would have to be

because of fortuitous circumstance that some of its customers reside in that State and presumably intend to use therein the property bought by them. While it may be conceded that under the Montgomery Ward and Sears, Roebuck cases a State is empowered to constitute its own citizens and those who have submitted themselves to its jurisdiction by doing business therein as involuntary agents for the collection of the tax, certainly the line must be drawn before the State can do this to sheer outsiders. In these days of bewildering taxation, a citizen, be he individual or corporate, has enough on his hands to keep his peace with his own taxing authorities and the National Government. To force him to conform to the taxing laws of other States which he has not entered, and to which he is a stranger, is to impose what is not only an intolerable burden, but likewise an unconstitutional one.

The judgment of the Supreme Court of Iowa should be reversed and the use tax of Iowa held to violate both the due process clause and the commerce clauses.

Respectfully submitted,

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APPENDIX.

(Personal Property Use Tax Act)

Section 1. (Sec. 6943.102 Code 1939.) The following words, terms and phrases when used in this act shall have the meanings ascribed to them in this section:

1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing" within the meaning of this subsection shall mean and include (1) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (2) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (3) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail.

(Paragraphs 2, 3, and 4, Sec. 1, omitted.)

5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this act; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this act to regard any salesmen, representatives, truckers, peddlers or canvassers, as the agent of the dealers, distributors, supervisors, em-

ployers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this act.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter three hundred eighty-six (386), code, 1939.

(Paragraphs 7, 8, 9, Section 1, omitted.)

Sec. 2. (Code Sec. 6943.103.) An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided.

Sec. 3. (Code Sec. 6943.104) The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, acts of the Forty-seventh General Assembly, (Code, Chap. 329.3, Div. IV, The Sales Tax Act) and any amendments made or which may hereafter be made thereto. This exemption does not include new motor vehicles as defined herein.

(Sec. 4, omitted.)

Sec. 5. (Code Sec. 6943.106.) The tax herein imposed shall be collected in the following manner:

(Par. 1, Sec. 5, omitted.)

2. The tax upon the use of all tangible personal property other than that enumerated in subsection one hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commission shall authorize pursuant to section nine, (Code Sec. 6943.110) shall be collected by such retailer and remitted to the state tax commission, pursuant to the provisions of sections eight to twelve inclusive. (Code Secs. 6943.109 to 6943.113 inclusive.)

3. The tax upon the use of all tangible personal property not paid pursuant to subsections one and two hereof shall be paid to the commission directly by any person using such property within this state, pursuant to the provisions of section thirteen hereof. (Code Sec. 6943.114.)

(Secs. 6 and 7, omitted.)

Sec. 8. (Code Sec. 6943.109.) Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions of section six hereof, shall at the time of making such sales, whether within or without

the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commission, if the commission shall, by regulation, require such receipt. Each such retailer shall list with the commission the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

(Sec. 9, omitted.)

(Sec. 10, omitted.)

Sec. 11. (Code Sec. 6943.112.) The tax herein required to be collected by any retailer pursuant to sections eight (Code Sec. 6943.109) or nine (Code Sec. 6943.110) hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state.

(Secs. 12, 13, 14, 15, 16, 17, 18, 19 and 20, omitted.)

Sec. 21. (Code Sec. 6943.122.) Whenever any retailer maintaining a place of business in this state, or authorized to collect the tax herein imposed pursuant to section nine (Code Sec. 6943.110) hereof, fails to comply with any of the provisions of this act or any orders, rules, or regulations of the commission prescribed and adopted under this act, the commission may, upon notice and hearing as hereinafter provided, by order revoke the permit, if any, issued to such retailer under section eleven (11) of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), or if such retailer is a corporation authorized to do business in this state under chapter three hundred eighty-six (386), code, 1939, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply

with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the commission an order finding that such corporation has complied with its obligations under this act. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given ten days' notice of the time, place, and purpose of such hearing. The commission shall have the power in its discretion to issue a new permit pursuant to section eleven of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), after such revocation.

(Secs. 22, 23, 24, and 25, omitted.)

Sec. 26. (Code Sec. 6943.125.) If any article of tangible personal property has already been subjected to a tax by any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles.

(Retail Sales Tax Act)

Sec. 2. (Code Sec. 6943.075.) Tax Imposed. There is hereby imposed, beginning the first day of April, 1937, a

tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the state to consumers or users * * *

The tax herein levied shall be computed and collected as hereinafter provided.